Office - Supreme Court, U.S.
FILED
SEP 14 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 417

JAMES J. MORAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH LEARY DELANEY,
580 Fifth Avenue,
New York 36, New York,
Attorney for Petitioner.

32 CASE PRESS INC., 82 Beekman St., N. Y.—COrtlandt 7-0484-5

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	3
STATEMENT	7
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	29
APPENDIX A—Opinion	30
APPENDIX B—Judgment	36

CITATIONS

Cases:

Bell v. United States (1955), 349 U. S. 81 25
Berra v. United States (1956), 351 U. S. 131..17,19,24,26
Bolling v. Sharpe (1954), 347 U. S. 497 28
Commissioner v. Wilcox (1946), 327 U. S. 404...2, 15, 16
Kepner v. United States (1904), 195 U. S. 100 .. 20
MacEvoy v. United States (1944), 322 U. S. 102 .. 20
Marion v. Commonwealth (1937), 269 Ky. 729 ... 12
Maryland v. Baltimore Radio Show (1950), 338 U. S. 912 12
McNabb v. United States (1943), 318 U. S. 332 ... 14

PAGE

Parr v. United States (1956), 351 U. S. 513 20
Pennekamp v. Florida (1946), 328 U. S. 331 12
People v. Mendola (4th Dept., 1956), 1 App. Div. 2d 413 13
Robinson v. United States (C.C.A. 8th, 1944) 142 F. 2d 431 21
Rutkin v. United States (1952), 343 U. S. 130 .... 15, 16
Shepherd v. Florida (1951), 341 U. S. 50 11
State v. Cory (Oregon Sup. Ct., 1955), 282 P. 2d 1054 28
State v. Pirkey (Oregon Sup Ct., 1955), 281 P. 2d 699 ..... 27, 28
Stroble v. California (1952), 343 U. S. 181 12
United States v. Achilli (C.A. 7th, 1956), 234 F. 2d 797 17
United States v. Beacon Brass Co. (1952), 344 U. S. 43 23
United States v. Chase (1890), 135 U. S. 255 21
United States v. H. J. K. Theatre Corp. (C.A. 2d, 1956), —— F. 2d —— 17, 24
United States v. Hutcheson (1941), 312 U. S. 219.. 26
Washington v. Miller (1914), 235 U. S. 422 22

English Citations:

2 Hale's Pleas of the Crown 219 12
5 Howell's State Trials 979 12
13 Howell's State Trials 222 12
1 Leach's Crown Pleas 28 12

Constitutional Provisions:

Amendment V 3, 28
Amendment VI 4

PAGE

Statutes:

Section 22(a) of the Internal Revenue Code of 1939 .... 4, 16

Section 145(b) of the Internal Revenue Code of 1939 .... 3, 5, 17, 18, 19, 20, 22, 23, 25, 26, 29

Section 3616(a) of the Internal Revenue Code of 1939 .... 3, 5, 17, 18, 19, 20, 22, 23, 26, 29

Section 1254(1), Title 28, United States Code 1

Federal Rules of Criminal Procedure:

Rule 7(a) 5, 26

Rule 7(c) 6, 25

Rule 21(a) 6, 11

Authorities:

4 Blackstone Commentaries 322 12

Sutherland Statutory Construction (3rd Ed.) ch. 52 22

Miscellaneous:

New York Times, Sept. 5, 1956 11

IN THE

Supreme Court of the United States

October Term, 1956

No.

JAMES J. MORAN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

James J. Moran, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinion Below

The opinion of the Court below (Appendix A, *infra,* 30-35) has not yet been reported.

Jurisdiction

The judgment of the Court below (Appendix B, *infra,* 36) was entered on August 15, 1956. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

Questions Presented

I

Whether petitioner, whose pre-trial motion for a change of venue from the United States District Court, Eastern District of New York, "to another United States District Court outside of the metropolitan area" had been denied, could have received a fair trial before the jury in view of the prejudice engendered against him by protracted and continuous inflammatory newspaper publicity?

II

Whether petitioner could have received a fair trial before the jury where the Trial Court peremptorily denied his motion for a mistrial when he was brought before the jury during trial shackled in handcuffs?

III

Whether petitioner could be convicted of "wilfully" attempting to evade and defeat his income taxes during the calendar years 1948, 1949 and 1950, a period during which the *Wilcox** ruling was in effect, where the Government offered no evidence of income beyond that reported except moneys allegedly received by petitioner through extortion?

---

* *Commissioner* v. *Wilcox* (1946), 327 U. S. 404.

IV

Whether the Trial Court erred in charging the jury that moneys extorted during the years 1948, 1949 and 1950 were taxable income as a matter of law?

V

Whether petitioner, charged with willfully attempting to evade and defeat a large part of his income taxes by filing false and fraudulent returns for the calendar years 1948, 1949 and 1950, may properly be sentenced to two years' imprisonment on each count, to run concurrently, and a $7,500 fine on each count, under Section 145(b) of the Internal Revenue Code of 1939, instead of being sentenced under Section 3616(a) of the Internal Revenue Code of 1939, which provides for a maximum imprisonment of one year, or a $1,000 fine, or both on each count?

Constitutional Provisions, Statutes and Rules Involved

Amendment V—Capital Crimes: Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 22(a) of Internal Revenue Code of 1939—Gross Income

(a) General definition

"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United

States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income.

Section 145(b) of Internal Revenue Code of 1939—Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Section 3616(a) of Internal Revenue Code of 1939—

Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made.

Rule 7(a) of the Federal Rules of Criminal Procedure

The Indictment and the Information

Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indict-

ment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

Rule 7(c) of the Federal Rules of Criminal Procedure

Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 21(a) of the Federal Rules of Criminal Procedure

For Prejudice in the District or Division. The Court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division

where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

Statement

While serving a twelve-and-one-half to twenty-five year sentence in a New York State prison for extortion (AA 436-438),* petitioner was indicted for wilfully attempting to evade and defeat his income taxes for the years 1948, 1949 and 1950 "by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of New York at Brooklyn, New York, a false and fraudulent" income tax return for each of such years (AA 6-8). The alleged income which petitioner did not report consisted wholly of the moneys which the State Court had found him guilty of receiving through extortion.

As stated by the Court below, petitioner "From the end of 1950 until after the close of the trial [June, 1955] • • • was continually exposed to unfavorable newspaper publicity" and "In the months immediately preceding the trial the publicity was especially inflammatory" (Appendix A, *infra*, 31-32). Because of such highly prejudicial and widespread publicity in the metropolitan press, petitioner, prior to trial, moved for an order to transfer the trial to another District Court outside the metropolitan area (AA 8-9) but such motion was denied (AA 49-50).

On the fourth day of trial, petitioner, while manacled in handcuffs, was marched into and through the courtroom

* AA designates references to Appellant's Appendix filed in the Court below.

to his place at counsel table in the presence and full view of the entire trial jury. Petitioner immediately moved for a mistrial. However, the Trial Court merely stated: "I expect the Marshal has a regulation. I don't think that has any effect on the jury" (AA 253).

At the trial, the Government established no more than that petitioner did not report on his income tax returns the moneys he allegedly received from the crime of extortion. No proof was introduced indicating in the slightest degree that petitioner had any claim of right to such moneys or that petitioner was not obliged to repay and return such moneys. No affirmative evidence whatsoever was introduced to establish that petitioner "wilfully" attempted to evade or defeat his taxes except for his failure to report such moneys on his tax returns. Yet the Trial Court denied petitioner's motions, made at the end of the Government's case and renewed after both sides rested, for a judgment of acquittal because of such failure to prove willfulness (AA 359, 363). And the Trial Court also denied petitioner's motion to set aside the verdict on the same grounds (AA 431, 433).

In the charge to the jury, the Trial Court stated that as a matter of law the extorted moneys allegedly received by petitioner were taxable income. In part the Trial Court charged (AA 402-403):

> "The money which the Government claims was paid to the defendant, Moran, was illegal money in that it was the result of either bribery or extortion. Illegal money such as this, however, as well as money received from legitimate sources such as salary, interest and dividends, is taxable income which a tax-

> payer must report on his return, and, if you find the defendant received the same and wilfully failed to report it, then you must find him guilty."

Petitioner took exception to such portion of the Trial Court's charge, and later moved to set aside the verdict upon the same grounds (AA 405, 432).

Petitioner was sentenced to imprisonment for a term of two years on each of the three counts, to run concurrently, and to a fine of $7,500 on each of said counts, making a total fine of $22,500 (AA 435). Although the validity of such sentence was not challenged before the Trial Court, the Court below permitted petitioner to raise such an issue "for the first time on appeal" (Appendix A, *infra*, 33). The Court below affirmed the judgment of conviction, stating in part (Appendix A, *infra*, 35):

> "In this case, as in *Berra*, there are facts falling within an area defined by the overlapping ambits of these two sections. Nevertheless, each section requires an element of proof not required by the other. This situation is directly controlled by *United States* v. *Beacon Brass Co.*, 344 U. S. 43, wherein it was held that where two statutes, each of which proscribe some conduct not covered by the other, overlap, a single act or transaction may violate both, at least where some different proof is required for each offense. *United States* v. *Gilliland*, 312 U. S. 86; *United States* v. *Lange*, S. D. N. Y., 128 F. Supp. 797."

In a footnote, the Court below commented that (Appendix A, *infra*, 35):

> "The Supreme Court in Berra, supra, at page 134, held only that the statutes were identical with regard to their respective intents and therefore

there was no question of fact to be submitted to the jury to choose between degrees of willfulness as in United States v. Spies, 317 U. S. 492. Aside from the issue of intent, which is identical under both sections, only §145(b) requires proof that the tax evaded was an income tax and only §3616(a) requires proof that there was a delivery or disclosure of a false statement or return."

Reasons for Granting the Writ

FIRST. Although the Court below noted that "the publicity in this case was more inflammatory than that in the cases cited by the Government" (Appendix A, *infra*, 32), the Court held that "In determining whether unfavorable publicity renders a fair trial impossible the court necessarily exercises a wide discretion which should be overturned only upon a clear showing of abuse" (Appendix A, *infra*, 32).

Examples of the type of highly prejudicial publicity which was carried in the New York City newspapers appear at pages 14 to 20 and 35 to 41 of Appellant's Appendix, and a list of the divers newspapers and dates of publication appears at pages 25 to 32 of Appellant's Appendix. In addition, during the entire course of the trial, from June 13, 1955, until June 20th, when the jury returned its verdict, each of the local newspapers daily printed accounts of the trial and, day after day, reiterated that petitioner was then serving a twelve-and-a-half to twenty-five year sentence in the State prison, and on the front pages of some of them petitioner was pictured in handcuffs (AA 355-356, 362-363, 431-433).

By petitioner's motion for a change of venue, made two months prior to trial, the Trial Court had been amply forewarned of the continuous and long existing highly unfavorable treatment of petitioner by the local press and should have foreseen that the same hostility would continue during the daily course of the trial. Despite the Trial Court's formal admonition to the jurors not to read any publicized accounts of the trial, it would be almost inconceivable to believe that knowledge of petitioner's prior convictions did not seep through to the jurors and, of course, greatly prejudice them.*

Rule 21(a) of the Federal Rules of Criminal Procedure was enacted for the very purpose of assuring defendants a fair trial before an impartial and unbiased jury. The motion for a change of venue was not a dilatory tactic. Indeed the motion was made two months before trial. The prejudicial publicity had been intense and critically timed. To have removed the trial to one of the two District Courts in New York outside New York City would have caused but minor inconvenience and little additional expense.

Only recently, the New York Times of September 5, 1956, printed an editorial under the heading "Conviction Before Trial", in which it is pointed out that newspaper accounts greatly prejudicial to defendants are becoming all too widespread.

Mr. Justice Jackson's language, in concurring in the reversal of a judgment of conviction in *Shepherd* v. *Florida* (1951), 341 U. S. 50, 52-53, is most apt here. There Mr.

---

* Inasmuch as petitioner did not take the witness stand, the Government was precluded from directly calling the jury's attention to his prior convictions.

Justice Jackson, in a concurring opinion joined in by Mr. Justice Frankfurter, stated:

> "But if freedoms of the press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial. These convictions, accompanied by such events, do not meet any civilized conception of due process of law. That alone is sufficient, to my mind, to warrant reversal." *

SECOND. Although the fact that petitioner had moved for a mistrial because he had been brought and exhibited before the jury shackled in handcuffs was pointed out to the Court below, the Court's opinion avoids all reference to this matter.

The common law rule against the shackling of prisoners is an old one, enforced in the English Courts as early as 1606 and frequently thereafter. For example, see 5 Howell's State Trials 979; 13 Howell's State Trials 222; 1 Leach's Crown Cases 28; 2 Hale's Pleas of the Crown 219; 4 Blackstone Commentaries 322.

In *Marion* v. *Commonwealth* (1937), 269 Ky. 729, 733, the Court pointed out:

> "It is a common law right of a person being tried for the commission of a crime to be free from all manner of shackles or bonds, whether of hands or

---

* See also Mr. Justice Frankfurter's opinion in *Maryland* v. *Baltimore Radio Show* (1950), 338 U. S. 912; his concurring opinion in *Pennekamp* v. *Florida* (1946), 328 U. S. 331, 365; and his dissenting opinion in *Stroble* v. *California* (1952), 343 U. S. 181, 201.

> feet, when in court in the presence of the jury, unless in exceptional cases where there is evident danger of his escape or in order to protect others from an attack by the prisoner. Whether that ought to be done is in the discretion of the court, based upon reasonable grounds for apprehension. But, if this right of the accused is violated, it may be ground for the reversal of a judgment of conviction."

In *People* v. *Mendola* (4th Dept., 1956), 1 App. Div. 2d 413, the Court, in reversing a judgment of conviction where the defendant had been brought before the jury in handcuffs, stated:

> "In this country, courts and judges early condemned the practice of conducting a criminal trial with the defendant in irons, State v. Kring, 1 Mo. App. 438, affirmed 64 Mo. 591; State v. Smith, 11 Or. 205, 8 P. 343; State v. Williams, 18 Wash. 47, 50 P. 580, 39 L. R. A. 821. It has been denounced as 'highly improper' and inconsistent with the presumption of innocence, Shultz v. State, 131 Fla. 757, 179 So. 764, as 'a revolting practice' which 'should rarely be done, and never, except in cases where the circumstances show real danger of escape', Faire v. State, 58 Ala. 74, and as 'obnoxious to the spirit of our laws and all ideas of justice,' Gray v. State, 99 Tex. Cr. R. 305, 268 S. W. 941, 950. There are cases, DeWolf v. State, 95 Okl. Cr. 287, 245 P. 2d 107; People v. Kimball, 5 Cal. 2d 608, 55 P. 2d 483, in which the trial court, in the exercise of a reasonable discretion, has properly ordered the defendant tried in manacles. But in each of those cases there was some imperative reason for the practice, and the necessity thereof was made to appear upon the record, frequently by the taking of testimony."

In the instant case there was absolutely no necessity and absolutely no reason for handcuffing petitioner. Petitioner was not manacled in the courtroom after such occasion. Nevertheless, by then the shocking effect had been created and the evil injury had been done. From then on any possible presumption of innocence had been dissipated and negatived.

The Trial Court seriously compounded the prejudice engendered when, upon petitioner's motion for a mistrial, the Court merely stated (AA 353): "I expect the Marshal has a regulation. I don't think that has any effect on the jury."

The Trial Court had no right to abdicate its duty to conduct a fair and impartial trial to the whim of any Marshall or Deputy Marshall. As this Court, in *McNabb* v. *United States* (1943), 318 U. S. 332, 340-341, aptly pointed out:

> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

Thus, not only because of the sustained and highly prejudicial publicity against petitioner was he denied a fair and impartial trial, but such a trial was also denied to him because of his being flaunted before the jury in handcuffs.

THIRD. In *Commissioner* v. *Wilcox* (1946), 327 U. S. 404, this Court held that embezzled money was not taxable. This Court, at page 408, stated:

> "For present purposes, however, it is enough to note that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of §22(a)."

Such interpretation was in effect during each year that petitioner filed his tax returns for 1948, 1949 and 1950. And in accordance with such interpretation none of the extorted moneys which petitioner allegedly received and failed to report were taxable income.

The *Wilcox* holding was in effect until 1952 when this Court handed down its decision in *Rutkin* v. *United States*, 343 U. S. 130. In the *Rutkin* case Mr. Justice Black, in a dissenting opinion concurred in by Justices Reed, Frankfurter and Douglas, at pages 139-140, pointed out:

> "We there pointed out that the embezzler had no bona fide legal or equitable claim to the money, was under a definite legal obligation to return it to its rightful owner, and consequently had no more received the kind of 'gain' or 'income' which Congress has taxed than if he had merely borrowed money. One who extorts money not owed him stands in this precise situation. He has neither legal nor equitable claim to the extorted money and is under a continuing obligation to return it to its owner."

Further, at page 141, Mr. Justice Black stated:

> "However, in my judgment, it stretches previous tax interpretations too far to classify the sporadic loot of an embezzler, an extortioner or a robber as taxable earnings derived from a business, trade or a profession. I just do not think Congress intended to treat the plunder of such criminals as *theirs.*"

While it is true, as the Court below pointed out (Appendix A, *infra,* 33), that there was no testimony that petitioner actually relied on the *Wilcox* case, it is submitted that that is irrelevant. During the critical years while petitioner was under an obligation to file returns for 1948, 1949 and 1950, the *Wilcox* case was the law. This Court had ruled that income of the kind in question was not taxable. Whatever may be the Government's right, in civil proceedings, to recover taxes as a result of this Court's change of position in the *Rutkin* case, there can be no basis for a criminal prosecution based upon the failure to report such income. No finding of wilfullness can possibly be sustained in the light of the law existing at the time the returns were filed. Consequently, petitioner's motion for a directed verdict of acquittal, both at the end of the Government's case and after the verdict, should have been granted.

FOURTH. In view of the fact that during the years petitioner filed the income tax returns in question, the effect of this Court's interpretation of Section 22(a) of the Internal Revenue Code was that "a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain" (*Commissioner* v. *Wilcox*

(1946), *supra*, 327 U. S. 404, 408), and in view of the fact that there is no presence of a claim of right to the moneys extorted and that there is a definite, unconditional obligation to repay or return moneys extorted, it was error for the Trial Court to charge the jury that (AA 402-403):

> "The money which the Government claims was paid to the defendant, Moran, was illegal money in that it was the result of either bribery or extortion. Illegal money such as this, however, as well as money received from legitimate sources such as salary, interest and dividends, is taxable income which a taxpayer must report on his return, and, if you find the defendant received the same and wilfully failed to report it, then you must find him guilty."

Petitioner excepted to such portions of the Court's charge, and later moved to set aside the verdict upon the ground that "the Court erred when you charged this jury that the income which was testified to by Mr. Smith was taxable income" (AA 405, 432).

FIFTH. The Court below has decided an important question contrary to the decision of this Court in *Berra* v. *United States* (1956), 351 U. S. 131. It is a question which has been raised in many other cases* and should be decided by this Court.

In the *Berra* case this Court decided that the offenses defined by Section 145(b), a felony, and Section 3616(a), a misdemeanor, were identical, insofar as filing a fraudu-

---

* For example, see *United States* v. *H. J. K. Theatre Corp.* (C. A. 2d, Aug. 20, 1956), — F. 2d —, following the instant case but with some reservations as indicated below; *United States* v. *Achilli* (C. A. 7th, July 31, 1956), 234 F. 2d 797, denying petition for rehearing because the question had not been previously raised.

lent income tax return with intent to defeat or evade taxes is concerned. Petitioner, although indicted under the first of these sections, claims he can be punished only under the second section, both because that dealt with the specific offense here involved, *i.e.*, filing a fraudulent tax return, and because the penalty provided therein is the lesser one.

(a) Petitioner was indicted under the provisions of the Internal Revenue Code of 1939. In substance each count of the indictment alleges that he did "wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife * * * by filing and causing to be filed with the Collector * * * a false and fraudulent joint income tax return" (AA, 6-8).

Section 145(b) of the Internal Revenue Code of 1939 provided in part that:

> "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Under the same Internal Revenue Code of 1939, Section 3616(a) provided in part that any person who

> "Delivers or discloses to the collector or deputy any false or fradulent * * * return, * * * with intent to defeat or evade the * * * assessment intended to be made * * * shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Section 3616(a) makes the specific act of filing or disclosing to the collector "any false or fraudulent * * * return * * * with intent to defeat or evade the * * * assessment intended to be made" a misdemeanor.

Not only did the Government in the *Berra* case agree that Section 3616(a) "was applicable to income tax returns", but the Government itself, in its brief in that case, admitted that "Section 3616(a) has frequently been utilized by the Government in the prosecution of income tax cases" (page 29 of Government's Brief filed in this Court).

And in order to sustain the Trial Court's refusal to grant the requested instruction to the jury in the *Berra* case even the majority of this Court necessarily had to find that both sections, insofar as the filing of a false and fraudulent income tax return with intent to evade and defeat incomes taxes is concerned, covered precisely the same ground.*

Section 145(b) makes the general act of wilfully attempting "in any manner" to evade or defeat any tax a felony.

---

* The legislative history of Section 3616(a) buttresses the fact that it applies to income tax returns. Section 3616(a) was first enacted as part of an Internal Revenue Act which contained an income tax. This was Chapter 173 of the 38th Congress, 1st Session, enacted 1864, 13 Stat. 223. Section 11 (13 Stat. 225) made it a duty on various persons "to make a list or return * * * of the amount of annual income * * *." Section 15 (id. 227—sometimes erroneously cited as 226) contains substantially the same language as 3616(a). Section 116 (id. 281) contains the provision relating to income tax. Section 118 (id. 282) provides that if an individual fails to file a return the assessor can assess. It imposes no other penalty. Sections 120-122 (id. 284, 285) impose specific taxes on certain corporations and provide a penalty of a fine for a failure to make a return but no penalty for a false return.

Unquestionably, a person may attempt to evade or defeat income taxes in myriad divers manners.* However, when an indictment charges that a defendant willfully attempted to evade and defeat his income taxes by filing a false and fraudulent return, such an offense is covered by both the specific language of Section 3616(a) and the general overlapping language of Section 145(b). And it is well established that where general language and specific language cover the same subject, the specific language applies.

Mr. Justice Murphy, in *MacEvoy* v. *United States* (1944), 322 U. S. 102, 107, pointed out:

> "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment * * * specific terms prevail over the general in the same or another statute which otherwise might be controlling.' D. Ginsberg & Sons v. Poplin, 285 U. S. 204, 208."

In *Kepner* v. *United States* (1904), 195 U. S. 100, 125, this Court stated:

> "It is a well-settled principle of construction that specific terms covering the given subject matter will

---

* The Government has acknowledged that acts other than the mere filing of a fraudulent income tax return could be prosesuted under Section 145(b). In the brief it submitted to this Court in *Parr* v. *United States* (1956), 351 U. S. 513, the Government, at page 74, pointed out: "Further, under the allegations of the first indictment in the Southern District the Government was required to prove affirmative acts of evasion independent of and in addition to proof that petitioner had willfully filed a false income tax return at Austin. It is true, as the United States Attorney stated to Judge Kennerly, that the same witnesses would be used in proving the case under either indictment; but the extent of their testimony and the manner of their testifying and the quality of their evidence might not be of critical importance under the simpler proof involved in the second indictment."

> prevail over general language of the same or another statute which might otherwise prove controlling."

Earlier, in *United States* v. *Chase* (1890), 135 U. S. 255, 260, this Court stated the same principle of law in the following language:

> "* * * It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' *Pretty* v. *Solly*, 26 Beavan, 610, per Romilly, M. R.; *State* v. *Comm'rs of Railroad Taxation*, 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes, 560."

In *Robinson* v. *United States* (C. C. A., 8th, 1944), 142 F. 2d 431, the defendant had been convicted of larceny of money that was a part of the postal revenues. This was a special offense for which Section 190 of the former Criminal Code prescribed a maximum sentence of not more than three years. But the punishment for stealing property of the United States generally was ten years, under Section 46 of the Criminal Code. The Court held that only the lesser punishment could be imposed, citing many Federal cases, and saying at page 432:

> "Elementally, the special stands against the general. That is, where there is a law against any stealing,

> and another and different law against stealing some particular thing, the two laws do not invalidate each other by conflict, but the courts treat the law against stealing the particular thing as presenting an exception to the law against stealing things in general. They enforce the exception. The special mandate of section 190, forbidding more than three years' imprisonment for larceny of the particular property that is Post Office property, must therefore prevail over the ten year term permitted for larceny of United States property in general.
>
> "* * *
>
> "* * * This rule is particularly applicable to criminal statutes in which the specific provisions relating to particular subjects carry smaller penalties than the general provisions."

Thus, under the Internal Revenue Code of 1939, where the same particular offense was covered by the specific language of Section 3616(a) and also by the general language of Section 145(b), only Section 3616(a) is applicable.

Furthermore, it makes no difference whether or not one section was enacted prior to the other.* In *Washington* v. *Miller* (1914), 235 U. S. 422, 428, Mr. Justice Van Devanter pointed out:

> "* * * In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (*United States* v.

---

* If there is any ambiguity, the principle construing statutes in *pari materia* applies: Sutherland Statutory Construction (3rd ED) ch. 52.

> *Healy*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, Id. 556, 570; *Rodgers* v. *United States*, 135 U. S. 83, 87-89); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

The Court below, while recognizing that a specific statute must control over a general one (Appendix A, *infra*, 34), felt free to permit a prosecution under Section 145(b) because, as it said, "only §145(b) requires proof that the tax evaded was an income tax and only §3616(a) requires proof that there was a delivery or disclosure of a false statement or return" (Appendix A, *infra*, 35). Petitioner submits that such an approach destroys the meaning of the rule. The Court below also thought that the case was controlled by this Court's decision in *United States* v. *Beacon Brass Co.* (1952), 344 U. S. 43. But the Court below failed to note that the only question before this Court in the consideration of that case was the applicability of the statute of limitations. No question of punishment whatever was involved. Moreover, in that case the prosecution charged a false statement with intent to evade taxes under a provision of law dealing with taxes. The contention that a more general provision of the Criminal Code, 18 U. S. C. 80, should prevail because it covered all

false statements was held inapplicable largely because various other statutes also dealt with false statements, indicating that Congress had not intended to limit false statement prosecutions to the general provisions of the Criminal Code.

In the case at bar, on the other hand, both of the sections under consideration are part of the tax law. Surely the means employed has greater significance than the character of the tax which is involved. In view of this Court's ruling in the *Berra* case that the two offenses were identical, petitioner submits the question presented requires clarification by this Court. In this connection this Court's attention is called to the doubts expressed by Judge Frank of the Court of Appeals for the Second Circuit in an opinion not yet reported, concurred in by Judges Hincks and Waterman, in *United States* v. *H. J. K. Theatre Corporation* (C. A. 2nd, Aug. 20, 1956), —— F. 2d. ——, where Judge Frank, referring to the opinion below, stated:

> "The writer of this opinion has some doubt about that reasoning. The question considered by the Supreme Court in *Berra* was confined to the rejected request for an instruction to the jury. The Court did not discuss *Spies* v. *United States*, 317 U. S. 492 or *United States* v. *Beacon Brass Co.*, 344 U. S. 43. If those cases were pertinent, it would seem that the Court would have affirmed, merely citing those cases. There is language in *Berra* which can be read as holding that the coverage of the two statutes is in all respects identical, and that the question as to which statute applied was not for the jury but solely for the judge when he came to sentencing. *Berra* can then perhaps be construed to mean that the judge improperly imposed the sentence for convic-

> tion of a felony. On that interpretation, we should, in the instant case, remand for resentencing under the misdemeanor statute. However, the writer is not sure enough about the above interpretation of *Berra* to justify his dissenting here."

(b) Another question presented by this case which was not passed on by the Court below and which calls for consideration by this Court is whether the Government may, at its option, prosecute under one of two laws imposing different penalties. Petitioner submits that, as a matter of simple decency, it has been a basic principle of our law to resolve doubts in the enforcement of our criminal laws against the imposition of a harsher penalty and in favor of the imposition of a lesser penalty. Mr. Justice Frankfurter, in *Bell* v. *United States* (1955), 349 U. S. 81, 83, pointed out:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

Of course, the fact that the indictment mentioned that it was brought under Section 145(b) has no legal significance. Indeed Rule 7(c) of the Federal Rules of Criminal Procedure in part provides:

> "Error in the citation [that is, of the statute which defendant is alleged to have violated] or its omission shall not be ground for dismissal of the

> indictment * * * if the error or omission does not mislead the defendant to his prejudice."

In *United States* v. *Hutcheson* (1941), 312 U. S. 219, 229, Mr. Justice Frankfurter stated:

> "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See Williams v. United States, 168 U. S. 382, 42 L. ed. 509, 18 S. Ct. 92. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations."

And the fact that the prosecution was instituted by indictment rather than by information in no way controls. Rule 7(a) of the Federal Rules of Criminal Procedure in fact specifically states in part:

> "Any other offense [than one punishable by death or by imprisonment for a term exceeding one year or at hard labor] may be prosecuted by indictment or by information."

The Government in the *Berra* case, *supra*, 351 U. S. 131, contended that "the Government may choose to invoke either applicable law", Section 145(b) or Section 3616(a), and "the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor."

In reference to such a delegation of power being in contravention to due process of law, the highest Court of Oregon has recently held in two cases that even though such a power had been specifically provided for by statute, such delegation was clearly unconstitutional.

In *State* v. *Pirkey* (1955), 281 P. 2d 699, the Supreme Court of Oregon held unconstitutional an Oregon statute which delegated to the Grand Jury or to the Committing Magistrate power to determine in advance whether to charge a defendant with a felony or a misdemeanor for issuing a check with insufficient funds in the bank with which to pay such check. The Court, at pages 702-703, stated:

> "It would be monstrous to uphold and enforce a statute which authorized a grand jury or magistrate to determine finally whether an accused should receive a fine or a jail sentence, on the one hand, or a penitentiary sentence, on the other, and to make that decision before trial, without having heard any evidence from the defendant, either on the issue of guilt or of mitigation, and on the sole basis of a *prima facie* case made against one still presumed to be innocent. * * * We see in this statute no provision whereby one charged with a misdemeanor could be sentenced as for a felony, however heinous the offense might after trial appear to have been. Again, if the defendant is proceeded against as for and convicted of a felony, there is no provision authorizing the court in its informed discretion to impose punishment as for a misdemeanor, however strong the evidence in mitigation might be. In our opinion, such a statute so construed would not only violate the Equal Protection Clause and constitute an unauthorized delegation of discretionary power, but it would constitute an invalid encroachment upon

> the function of the courts whose prerogative and duty it is to determine, not only guilt, but punishment, upon judicial inquiry, after public trial and within the maximum and minimum limitations prescribed by the legislature."

And, at page 705, the Court said:

> "It might be said that this statute classifies punishments but does not classify the circumstances to which the diverse punishments are to be applied. This is not legal classification. It is legal chaos."

And in *State* v. *Cory* (1955), 282 P. 2d 1054, the same Court struck down a similar statute upon the same grounds as those given in the *Pirkey* case.

The foregoing two decisions construed the equal protection clause of the Fourteenth Amendment, which of course binds only the States. But the same concept of unjustifiable discrimination offends equally against the due process clause of the Fifth Amendment that is operative against the United States. As Chief Justice Warren pointed out in *Bolling* v. *Sharpe* (1954), 347 U. S. 497, 499:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

Consequently, any such unbridled discretion in a United States Attorney or a Federal Grand Jury to determine whether the precise act shall be deemed a felony under Section 145(b) or a misdemeanor under Section 3616(a) would offend against the due process clause of the Fifth Amendment.

Hence, the only applicable punishment which could properly have been imposed here is that provided for in Section 3616(a): a fine not exceeding $1,000 or imprisonment not exceeding one year or both.

This Court should grant certiorari here in order to resolve this important question in the enforcement of our criminal laws and to determine whether or not a prosecutor may, at his option and based upon the same alleged offense, prosecute one man for a felony and another for a misdemeanor. Indeed the present case is pre-eminently one where interest in the even-handed administration of justice calls for the exercise of this Court's supervisory jurisdiction.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York City, September 14, 1956.

Respectfully submitted,

JOSEPH LEARY DELANEY,
580 Fifth Avenue,
New York 36, New York,
Attorney for Petitioner.

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 367 — October Term, 1955

(Argued June 4, 1956 Decided August 15, 1956.)

Docket No. 23881

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES J. MORAN,

Appellant.

Before:

CLARK, *Chief Judge*, HINCKS and WATERMAN,
Circuit Judges.

On appeal from a judgment of conviction entered in the Eastern District of New York by Inch, *J.*, after a jury trial finding defendant guilty of federal income tax evasion on three counts under §145(b), I. R. C. of 1939. Affirmed.

CORNELIUS W. WICKERSHAM, JR.,
Chief Assistant United States Attorney,
Eastern District of New York, Brooklyn, N. Y.
(Leonard P. Moore, United States Attorney,
E. D. N. Y., Brooklyn, N. Y., on the brief),
for appellee.

JOSEPH LEARY DELANEY, New York, N. Y.,
for appellant.

HINCKS, *Circuit Judge*:

This is an appeal from a judgment of conviction in the Eastern District of New York, on three counts of federal income tax evasion for the calendar years 1948, 1949, and 1950, in violation of §145(b), I. R. C. of 1939. The defendant was sentenced to imprisonment for a term of two years on each count, to run concurrently, and to a fine of $7500 on each count.

The evidence showed that the defendant was a First Deputy Fire Commissioner of New York City who received and failed to report a portion of extortion payments collected by members of the Division of Combustibles from contractors who needed permits for installing oil burners. An extensive review of the evidence is not necessary since there is no claim that the evidence was insufficient to support proof of the corpus delicti. The defendant assigns error for denial of his pre-trial motion for change of venue under Rule 21(a), Federal Rules of Criminal Procedure; for the court's charge that extortion receipts are taxable income; for failure of proof on the issue of willfulness; and for improper sentencing under the felony provisions of §145(b), I. R. C. of 1939, rather than under the overlapping misdemeanor provisions of §3616(a), I. R. C. of 1939. We will consider these contentions seriatim.

1. At the time of trial in this case (June 1955), the defendant was already serving a 12½ to 25 year New York State sentence for extortion and conspiracy to extort, and was under an additional 5 year federal sentence for perjury arising out of the Kefauver crime investigation. From the end of 1950 until after the close of the trial the defen-

dant was continually exposed to unfavorable newspaper publicity. In the months immediately preceding the trial the publicity was especially inflammatory. On April 18, 1955, the defendant moved for a change of venue under Rule 21(a). This motion was denied in an unreported opinion by Rayfiel, *J.*, on May 4, 1955. On impaneling the jury on June 13, 1955 only two jurors were excused for cause (one at the Government's request), and the defendant exercised only eight of his ten peremptory challenges.

We think the publicity in this case was more inflammatory than that in the cases cited by the Government, *United States* v. *Moran*, 2 Cir., 194 F. 2d 623, cert. denied 343 U. S. 965; *Bianchi* v. *United States*, 8 Cir., 219 F. 2d 182, 191, cert. denied 349 U. S. 915; and *Dennis* v. *United States*, D. C. Cir., 171 F. 2d 986, 992, aff'd 339 U. S. 162. Nevertheless, the background of the trial here differed materially from that in *Shepherd* v. *Florida*, 341 U. S. 50, and *United States* v. *Florio*, S. D. N. Y., 13 F. R. D. 296—cases relied on by the defendant in which it was held that changes of venue should be granted. Rule 21(a) of the Federal Rules of Criminal Procedure provides that the trial court shall transfer the proceeding to another district if it is satisfied that the prejudice in its district is so great that the defendant cannot there obtain a fair and impartial trial. In determining whether unfavorable publicity renders a fair trial impossible the court necessarily exercises a wide discretion which should be overturned only upon a clear showing of abuse. Here, especially in view of the lack of difficulty in impaneling a jury satisfactory to the defendant, we cannot say that the discretion was improperly exercised.

2. The extortion receipts were clearly taxable. *Rutkin* v. *United States*, 343 U. S. 130, See *United States* v. *Bruswitz*, 2 Cir., 218 F. 2d 59, cert. denied 349 U. S. 913.

3. There was sufficient evidence of willfulness in "a consistent pattern of underreporting large amounts of income." See *Holland* v. *United States*, 349 U. S. 121. It is asserted in defendant's brief on appeal that the defendant might have relied in good faith during the indictment years (prior to the opinion in *Rutkin*, *supra*) on the applicability of *C. I. R.* v. *Wilcox*, 327 U. S. 404 (holding embezzled funds non-taxable) to extorted funds, and therefore did not willfully evade his income taxes. As to this, it is enough to say that there was no evidence that the defendant had actually relied on the *Wilcox* case. The evidence was sufficient to support the finding of willfulness which was implicit in the verdict.

4. The defendant also claims that he was improperly sentenced under 26 U. S. C. §145(b), under which the indictment was drawn, rather than under 26 U. S. C. §3616(a). This issue is raised by the defendant for the first time on appeal as a result of the recent Supreme Court decision in *Berra* v. *United States*, 351 U. S. 131. That we may consider the question so raised is settled by *United States* v. *Chiarella*, 2 Cir., 184 F. 2d 903, 911; Rule 52(b), Federal Rules of Criminal Procedure.

The indictment charged the defendant in three counts with willful and knowing attempts to evade and defeat a large part of his income tax due by filing false and fraudulent returns with the Collector of Internal Revenue. It

is clear that both the indictment and the proofs introduced at the trial were sufficient to support convictions under either §145(b)* or §3616(a).** The former is a felony and contains a maximum five year penalty. The latter is a misdemeanor with a maximum one year penalty. Both parties agree that where a general and a specific statute cover the same offense the specific statute controls.*** The defendant contends that, since §145(b) deals with "any manner" of evasion, whereas §3616(a) concerns only the filing of a false return, the latter is more specific. The Government argues that, since §145(b) deals solely with evasion of the income tax, whereas §3616(a) deals with disclosure of false information under any chapter of the Internal Revenue Code, the former is more specific.

---

* "§145. Penalties.

"(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalites provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

** "§3616. Penalties.

"Whenever any person—

"(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

*** See *MacEvoy* v. *United States*, 322 U. S. 102, 107; *Washington* v. *Miller*, 235 U. S. 422, 428; *Kepner* v. *United States*, 195 U. S. 100, 125; *United States* v. *Chase*, 135 U. S. 255, 260; *Robinson* v. *United States*, 8 Cir., 142 F. 2d 431.

In this case, as in *Berra,* there are facts falling within an area defined by the overlapping ambits of these two sections. Nevertheless, each section requires an element of proof not required by the other.* This situation is directly controlled by *United States* v. *Beacon Brass Co.,* 344 U. S. 43, wherein it was held that where two statutes, each of which proscribe some conduct not covered by the other, overlap, a single act or transaction may violate both, at least where some different proof is required for each offense. *United States* v. *Gilliland,* 312 U. S. 86; *United States* v. *Lange,* S. D. N. Y., 128 F. Supp. 797.

We need not now decide whether prosecution under one overlapping statute constitutes an election effective to bar prosecution under the other. It is sufficient for present purposes that the defendant was properly convicted and sentenced under §145(b) of the Internal Revenue Code of 1939.

Affirmed.

---

* The Supreme Court in *Berra, supra,* at page 134, held only that the statutes were identical with regard to their respective intents and therefore there was no question of fact to be submitted to the jury to choose between degrees of willfulness as in *United States* v. *Spies,* 317 U. S. 492. Aside from the issue of intent, which is identical under both sections, only §145(b) requires proof that the tax evaded was an income tax and only §3616(a) requires proof that there was a delivery or disclosure of a false statement or return.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of August, one thousand nine hundred and fifty-six.

Present: HON. CHARLES E. CLARK, *Chief Judge,*
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN, *Circuit Judges.*

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAMES J. MORAN

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes and rule involved	2
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:

Berra v. *United States*, 351 U. S. 131	10
Blaine v. *United States*, 136 F. 2d 284	7
Commissioner v. *Wilcox*, 327 U. S. 404	8, 9
Corliss v. *Bowers*, 281 U. S. 376	9
Cwach v. *United States*, 212 F. 2d 520	7
Dennis v. *United States*, 171 F. 2d 986	6
Holt v. *United States*, 218 U. S. 245	7
Humphreys v. *Commissioner*, 125 F. 2d 340, certiorari denied, 317 U. S. 637	9
Kersten v. *United States*, 161 F. 2d 337, certiorari denied, 331 U. S. 851	6
Lias v. *United States*, 51 F. 2d 215, affirmed, 284 U. S. 584	7
Marion v. *Commonwealth*, 269 Ky. 729	7
Medley v. *United States*, 155 F. 2d 857, certiorari denied, 328 U. S. 873	6
National City Bank of New York v. *Helvering*, 98 F. 2d 93	9
Rutkin v. *United States*, 343 U. S. 130	9
Stroud v. *United States*, 251 U. S. 15	6
United States v. *Achilli*, 234 F. 2d 797	10
United States v. *Sullivan*, 274 U. S. 259	9

Statutes:

Internal Revenue Code of 1939:	
Sec 145 (b) (26 U. S. C. 1952 ed., Sec. 145 (b))	2, 9
Sec. 3616 (a) (26 U. S. C. 1952 ed., Sec. 3616 (a))	3, 9

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 21 (a)	3, 6

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 417

JAMES J. MORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 30–35) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1956. (Pet. 36.) The petition for writ of certiorari was filed on September 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying petitioner's pre-trial motion for a change of venue.

2. Whether petitioner was deprived of a fair trial by reason of his being brought into court in handcuffs on one occasion.

3. Whether petitioner's conviction for failing to report the proceeds of extortion as income was invalid as a matter of law under *Commissioner* v. *Wilcox*, 327 U. S. 404.

4. Whether the trial court erred in imposing upon petitioner, under Section 145 (b) of the Internal Revenue Code of 1939, a sentence in excess of that which could have been imposed under Section 3616 (a) of the Code.

STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False returns.* Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3616 (a).)

Federal Rules of Criminal Procedure:

Rule 21. *Transfer from the District or Division for Trial.*

(a) *For Prejudice in the District or Division.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

* * * * *

STATEMENT

Petitioner was indicted on February 24, 1955, in the United States District Court for the Eastern District of New York on three counts of wilful attempted evasion of his individual income taxes for the years 1948, 1949 and 1950, in violation of Section 145 (b) of the Internal Revenue Code of 1939. The amounts

of net income and the tax liability thereon, as reported in the returns and as corrected, were alleged to be as follows (AA. 6–8):[1]

Year	Net income		Income tax	
	Reported	Corrected	Reported	Corrected
1948	$11,308.22	$96,308.22	$1,381.86	$42,543.12
1949	8,720.33	114,720.33	880.84	54,502.62
1950	11,432.69	86,932.69	1,463.32	37,987.40
Total	31,461.24	297,961.24	3,726.02	135,033.14

Petitioner's pre-trial motion for change of venue, based on the allegation that there existed so great a prejudice against him in the New York area as the result of unfavorable publicity that he could not get a fair trial there, was denied. (AA. 46–50.) After a jury trial, petitioner was found guilty on all counts. (AA. 408–409.) On June 30, 1955, he was sentenced to concurrent two-year prison terms on each of the counts and fined $7,500 on each count, making a total fine of $22,500. (AA. 435, 439–440.)

The evidence to support the verdict may be summarized briefly as follows:

Petitioner was appointed First Deputy Fire Commissioner of the New York City Fire Department in 1946. (AA. 70.) At that time the City required persons storing fuel oil to take out a permit, which in turn required an inspection, including a pressure test. (AA. 110, 144.) By the end of 1947 there was

[1] The record filed by petitioner consists of (1) the Appendix to appellant's brief in the Court of Appeals, and (2) the Appendix to the Government's brief in that court. The former is designated in the petition as "AA", and will be so designated in this brief; the latter will be designated as "GA".

a great backlog of pending inspections and the installers of fuel oil tanks were pressing the Fire Department to get them completed. (AA. 110.) Petitioner organized a new squad of permanent inspectors in the Bureau of Combustibles, headed by one Smith. He instructed Smith to set up a price scale under which the installers would pay the inspectors a fee ranging between $10 and $35 in currency for each fuel oil tank installation, in consideration of their waiving the pressure test and expediting the issuance of the permits. (AA. 73–78, 206.) Pursuant to petitioner's instructions, Smith collected the cash from the inspectors weekly during the prosecution years, out of which he paid them their salaries and took his own salary. The balance, ranging between $400 and $2,500 per week, was paid over surreptitiously to petitioner by Smith weekly in bills of $50 and $100 denomination. (AA. 78–80, 85–89, 94, 115, 147, 165.) Smith estimated that the total amounts thus paid to petitioner were about $38,000 in 1948, $53,000 in 1949 and $47,000 in 1950. (AA. 150–157.) Smith's testimony was corroborated by a number of inspectors who had collected the cash fees from the installers and turned it over to Smith. (AA. 169–182, 218–230, 240–244, 248–265, 302–308, 316–320.) None of the money received by petitioner from Smith was reported on his income tax returns. (AA. 66–68.)

The defense introduced no evidence.

ARGUMENT

1. Petitioner's first contention (Pet. 10–12) is that the trial court erred in denying his pre-trial motion

for a change of venue. (AA. 8 *et seq.*) He argues that he was unable to obtain an impartial jury in the New York metropolitan area because (1) he had been subjected to unfavorable newspaper publicity for four years before the trial; and (2) the local newspapers printed daily accounts of the trial, making reference to the fact that he was already serving a long sentence in the State prison.

Rule 21 (a) of the Federal Rules of Criminal Procedure requires a change of venue "if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial * * *." Of course the burden of proof is upon the defendant. The motion is addressed to the trial court's discretion, and its denial is not error in the absence of abuse of discretion. *Stroud* v. *United States,* 251 U. S. 15, 18–20; *Dennis* v. *United States,* 171 F. 2d 986, 992 (C. A. D. C.); *Kersten* v. *United States,* 161 F. 2d 337, 339 (C. A. 10th), certiorari denied, 331 U. S. 851. In denying petitioner's motion the district judge assured him that he would "have ample opportunity at the trial to examine prospective jurors as to their knowledge of the matters hereinabove referred to, and as to the existence of any prejudice or hostility." (AA. 48.) Although it does not appear in the printed record, all prospective jurors were examined on *voir dire* by counsel for both sides. Only two were excused for cause, and petitioner exercised only eight of his ten peremptory challenges. (GA. 2a.) Cf. *Medley* v.

United States, 155 F. 2d 857, 859 (C. A. D. C.), certiorari denied, 328 U. S. 873. In the light of these developments at the trial, it seems clear that the district court did not abuse its discretion in concluding, after careful study (AA. 46–48), that twelve unbiased jurors could be selected from among the five million inhabitants of the District. Such a conclusion "ought not to be set aside by a reviewing court unless the error is manifest * * *." *Holt* v. *United States*, 218 U. S. 245, 248.

2. Petitioner argues (Pet. 12–14) that he was denied a fair trial because on one occasion, on the fourth day of trial, he was brought into court before the jury in handcuffs (AA. 253). Concededly, in the absence of unusual circumstances a defendant should not be manacled throughout the course of the trial, and the cases cited by petitioner go no further than that. None of those cases dealt with the unusual situation presented here, where the petitioner was unfettered throughout the trial except for a single, isolated occasion when, apparently through inadvertence, he entered the courtroom wearing handcuffs, whereupon the judge immediately ordered them removed. It is well-settled that in such circumstances there is no ground for a new trial. *Lias* v. *United States*, 51 F. 2d 215, 217 (C. A. 4th), affirmed, 284 U. S. 584; *Blaine* v. *United States*, 136 F. 2d 284, 285 (C. A. D. C.); *Cwach* v. *United States*, 212 F. 2d 520, 527 (C. A. 8th). In the case principally relied on by petitioner, *Marion* v. *Commonwealth*, 269 Ky. 729, 734, the court quoted the following with approval:

> The failure, through an oversight, to remove shackles from a prisoner for a short time after proceedings have commenced, or any technical violation of the rule prohibiting shackling, not prejudicial to him, is not ground for a new trial.

Petitioner complains that the Court of Appeals' "opinion avoids all reference to this matter" (Pet. 12). The reason for this omission seems to be that the point was barely mentioned in his brief in the court below, as part of his argument that his motion for a change of venue should have been granted. We think it must be regarded as an afterthought. The United States Attorney has advised us that the point was not mentioned during the oral argument and that if it had been raised in the brief he would have printed, as part of the Appendix to the Government's brief in the Court of Appeals, extracts from the *voir dire* examination of the jurors, showing that defense counsel indicated several times before the jurors that petitioner was serving a sentence in the State Prison. It will be noted that defense counsel brought out several times, during the cross-examination of Government witnesses, that petitioner had already been prosecuted for other crimes. (AA. 97, 120, 232.)

3. The next contention (Pet. 15–16) is that petitioner could not have been convicted, as a matter of law, of wilfully failing to report as income funds received during the years 1948–1950 from extortion. Petitioner argues that during those years the issue of taxability was governed by the case of *Commissioner* v. *Wilcox*, 327 U. S. 404 (which held the proceeds of embezzlement to be non-taxable) and that it was not

until 1952 that this rule was changed by *Rutkin* v. *United States*, 343 U. S. 130 (which held the proceeds of extortion to be taxable). This argument is plainly without merit because (1) there was no evidence here that petitioner relied upon the *Wilcox* case, (2) the evidence showed that petitioner had not embezzled the funds in question, but had extorted them, and (3) monies received from extortion constituted taxable income to their recipients under cases decided long before the *Rutkin* case. *Humphreys* v. *Commissioner*, 125 F. 2d 340 (C. A. 7th), certiorari denied, 317 U. S. 637; *National City Bank of New York* v. *Helvering*, 98 F. 2d 93 (C. A. 2d); cf. *United States* v. *Sullivan*, 274 U. S. 259; *Corliss* v. *Bowers*, 281 U. S. 376.[2]

4. Petitioner's final contention (Pet. 17–29) is that the sentence imposed against him is illegal in that it exceeds that which could have been imposed under Section 3616 (a) of the Internal Revenue Code of 1939[3] (*supra*, p. 3), even though he was indicted and convicted under Section 145 (b) of the Code (*supra*, p. 2). This argument is similar to those made in *Doyle* v. *United States* and *Achilli* v. *United States* (both pending on petitions for certiorari, Nos. 386 and 430, respectively, this Term). These ques-

[2] Petitioner also urges (Pet. 16–17) that the court erred in charging the jury (AA. 402–403) that the funds in question, if received by him, would constitute taxable income. This, of course, was a correct statement of the law. (See cases cited in the text.)

[3] The court imposed concurrent two-year prison terms and a $7,500 fine on each of the three counts. (AA. 435, 439–440.) Section 3616 (a) prescribes a maximum of one year and $1,000 with respect to each count.

tions, arising from the overlap of the two Code provisions (see *Berra* v. *United States,* 351 U. S. 131), are being raised with increasing frequency in the lower courts. The Court of Appeals considered this question on the merits and decided it adversely to petitioner (Pet. 33–35), even though it had not been raised in the trial court, nor in his main brief in the Court of Appeals. Although it is desirable that the question be definitely resolved, the Court may consider that review by it should await the arrival of a petition and record properly presenting the issue. In the *Berra* case, *supra,* where the defendant had called Section 3616 (a) to the attention of the trial court by requesting an instruction to the jury, this Court (Justices Black and Douglas dissenting) found it unnecessary to decide whether the sentence was excessive. It would appear, *a fortiori,* that the question is not presented by the record in the instant case, on which it was not raised in the District Court in any manner. *United States* v. *Achilli,* 234 F. 2d 797, 808–810 (C. A. 7th).

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
RICHARD B. BUHRMAN,
Attorney.

OCTOBER, 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956